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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 864.

LOWE BROTHERS COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Certain new points made in respondent's brief make it advisable to file this reply brief.

THE DEFENSE THAT THERE WAS AN ACCOUNT SETTLED WAS NOT MADE BY RESPONDENT UNTIL THE FILING OF ITS BRIEF IN THIS COURT.

On page 15 of its brief, respondent argues that there was an account settled which bars recovery. No such defense was made in the District Court or in the Circuit Court of Appeals. No such affirmative defense was pleaded in the answer of defendant. (R. 11 to 14.)

If this defense had been pleaded it could easily have been met. It is true, as respondent states, that on May 2, 1924, the taxpayer paid $20,541.63 in cash, being the balance of the 1917 deficiency after the credit here sued for (R. 25). It is also true, as the Government well knows, that the petitioner filed a timely claim for the refund of this $20,541.63 paid for 1917 on the ground that it was an overpayment under section 607 and the respondent refunded this money to the petitioner. If respondent had considered that there was an account settled it would not have done this. The reason this fact was not proved on the trial was because no such defense was pleaded or suggested. The respondent was as fully aware of this fact as was the plaintiff. The statute declared in express words this money was an overpayment and expressly allowed the taxpayer four years to object to it by filing a refund claim. The taxpayer made the statutory objection in the statutory manner and in the statutory time and the defendant promptly refunded the cash. The only reason it did not refund the sum collected by credit is stated in its letter of January 29, 1929 (R. 21), wherein it contends that the credit was made when the first schedule was signed. As pointed out at page 27 of our main brief, the Court of Claims did not decide this contention adversely to the respondent until May 6, 1929, and this Court did not affirm that decision until February 1, 1931.

Furthermore, there could not be an account settled in this case for the reason stated by Judge Hand in *Untermyer* v. *Bowers*, 79 F. (2d) 9, 11 (C. C. A. 2nd) quoting Restatement of the Law of Contracts. The reason the taxpayer did not object at the time the credit was made was because the credit was made by mutual mistake of law. Neither of the parties knew that the right to make it was barred. In such circumstances petitioner could not be expected to object at the time. The case of *Stearns Company* v. *United States*, 291 U. S. 54, is distinguishable because the taxpayer there, unlike the taxpayer here, did not

file a claim for refund within four years of the date of the cash payment or of the date of credit. This is stated by the Court at the bottom of page 66 of that case. The suit there was the suit on an account stated while here the suit is to recover an overpayment of tax and not on an account stated. Furthermore, in the Stearns case this Court held that the filing of a claim for credit estopped the taxpayer to recover. There is no claim for credit here. While the Stearns case is not applicable here, yet it is respectfully submitted that it went too far because it permitted an equitable defense to repeal or at least write an exception into the express provision of a statute. The very exception which that decision read into the statute was placed in it by the Senate at the request of the Treasury Department but the House refused to agree to it and it was stricken out in conference. In other words Congress, after deliberate consideration, expressly refused to enact the exception which that decision subsequently read into the law. For the history of legislative proceedings, which show this see the dissenting opinion of Judge Littleton in *Naumkeag Steam Cotton Company* v. *United States*, 2 Fed. Supp. 126 at p. 152.

THE DEFENSE THAT THE COMMISSIONER DID NOT HAVE AUTHORITY TO ALLOW A 1918 OVERPAYMENT IS MADE FOR THE FIRST TIME IN THIS COURT.

Another defense made for the first time in this Court is that the Commissioner did not have authority to allow the 1918 overpayment. The acts of public officers are presumed to be regular and in the absence of an express showing to the contrary it must be presumed that the Commissioner's action in allowing the 1918 overpayment was proper. No such defense was made in the answer of defendant (R. 11 to 14) or in either of the Courts below. If it had been made petitioner would have had an opportunity

to and could have met it. In the absence of an affirmative showing rebutting it in this particular the presumption of regularity must prevail. (See our main brief page 25.)

VIEWING THE ACTION AS ONE TO RECOVER A 1917 OVERPAYMENT THE APPLICABLE PROVISIONS OF THE STATUTE WERE COMPLIED WITH.

In the statement of facts in respondent's brief it is correctly stated that the Collector made the credit April 24, 1924, and it was approved by the Commissioner on May 10, 1924. The statute of limitations on the right to make it expired with the waivers on April 1, 1924. (R. 38) See also *Aiken* v. *Burnet,* 282 U. S. 277 at p. 279. The claim for 1917 tax was filed April 2, 1928, within four years of the date of the credit, was rejected February 1, 1929, and suit was filed May 24, 1930. Thus, if the credit in 1924 of the 1918 overpayment to the 1917 tax constituted a payment of the 1917 tax, both the claim for that 1917 tax and this suit were unquestionably filed in time.

THE BASIS OF THE HOLDING THAT THE CREDIT CONSTITUTED A COLLECTION OF THE 1917 TAX.

In *Boston Pressed Metal Co.* v. *United States,* 42 F. (2d) 313, the taxpayer contended that it was suing for a 1918 overpayment which was credited to an outlawed tax for 1917, the collection of which had been stayed by a claim in abatement. The taxpayer contended that the credit was void and did not constitute a collection of the 1917 tax and hence, the collection of the 1917 tax was not stayed by a claim in abatement and recovery was not prevented by the provisions of Section 611 of the Revenue Act of 1928. The Court of Claims rejected this contention. In 42 F. (2d) 312 at page 313, it quoted Section 609 (in issue in the case at bar) and then said concerning taxpayer's contention:

> "We do not think this contention is well founded, but consider it clear that under the express language of

> section 609 the credit is treated as a 'payment in respect of such liability' against which ('against the liability') the credit is taken. When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned was in law the same as if the collector had received cash from the plaintiff; and by the express language of section 609 the question of whether it is to be considered an overpayment, and hence recoverable, is to be determined under section 607, which in turn under its provisions depends on section 611."

This court granted certiorari and the taxpayer advanced the same contention in this court. This court rejected that contention in 282 U. S. 409, at page 424, in these words:

> "There is also a contention that section 611 does not apply when the tax was paid by the credit of the amount of an overpayment for another taxable year. But the application of a credit against an assessment at a time when collection was barred must be regarded as an erroneous collection, and we see no reason for taking such a case out of the statute."

It is because of this statement that the courts below have held the credit of an overpayment for one year to an outlawed tax for another year constitutes an erroneous collection of said outlawed tax.

THE 1917 TAX WAS COLLECTED BY THE COLLECTOR WHO MADE THE CREDIT.

It cannot be denied that the only officer of the United States authorized to collect taxes is the Collector of Internal Revenue (or his deputies).

The statute quoted on page 5 of our main brief and on page 18 of respondent's brief is the only statute in existence dealing with credits. (So stated in L. O. 1106, C. B. 1-2, p. 221.) This statute does not say who shall make the credit. Neither does any other statute. We have examined the statutory law for any provision that the Commis-

sioner is to make the credit but have found none. By 26 U. S. C. Section 1670 (R. S. 3220) the Commissioner is authorized "to remit, refund and pay back all taxes erroneously or illegally assessed or collected." Each tax year is a separate compartment and a remission of taxes overpaid for one year is different than the credit of the amount so remitted to collect taxes for another and different year.

Furthermore, when the Commissioner signs the first schedule he cannot know, as expressly stated by this Court (for quotation see our main brief page 21) whether the taxes remitted will be credited. The government stated in its brief in this Court in the Swift case that the signing of a second schedule was discontinued after January, 1927, and the second schedule is no longer important because since the Swift decision, Congress, as stated in our main brief, has enacted a statute providing that the date of the signing of the first schedule shall govern in case of schedules signed after May 28, 1928. To hold that the Commissioner has collected the taxes in the face of a statute authorizing only the Collector to collect taxes and in the absence of any statute expressly declaring that the Commissioner shall do other than determine whether taxes have been overpaid for any year, is to resolve the doubt both against the taxpayer and to adopt a strict construction of the statute conferring jurisdiction instead of the liberal construction to which it is entitled. The result of such a holding is to split the jurisdiction in the many cases in which part of a liability is collected in cash and part by credit for in a suit for the cash collected there can be no question about the right of the taxpayer to sue in the District Court for the cash.

THE WORD "VOID" IN SECTION 609 SHOULD BE CONSTRUED TO MEAN VOIDABLE.

At pages 10 to 13 of its brief respondent argues that the word "void" in section 609(a) should be construed to mean "the attempted credit is a nullity" and hence it follows that the taxpayer has an action, if at all, for 1918. It couples this with the argument (Br. p. 12) that the making of the credit constituted a rejection of the 1918 refund claim and hence the taxpayer's action is barred.

As pointed out at pages 28 and 29 of our main brief, the effect of the adoption of such a construction will be to nullify and defeat the purpose of the statute. Also the effect of such a construction in cases such as this where part of a deficiency is paid by cash and part by credit is to split the cause of action into one for each of two different years. Unquestionably this taxpayer had a cause of action for the year 1917 for the cash payment yet if the construction contended for by the Government be adopted its cause of action for the credit will be for the year 1918. Both of these things grow out of a single transaction and it is submitted that the incongruous result of splitting the cause of action into a cause of action for each of two different years should not be reached. In each case the complaint is the same, viz., that the transaction was outlawed.

Furthermore it cannot be contended by the Government that the credit was "void" from the time it was made in 1924 to May 29, 1928, when the Revenue Act of 1928 was enacted. The sole purpose of Congress in enacting Section 609(a) was to make certain that the taxpayer would get a refund of outlawed credits. It has not been and cannot reasonably be suggested that it had any other purpose. The section must be construed liberally to effectuate its purpose. Such a construction as that contended for by the government will nullify it if it is also held, as the government contends, that the making of the credit constitutes a rejection of the 1918 refund claim. The case of *Bertelsen & Peterson, Engineering Co.* (as explained at page 13 of the govern-

ment's brief) is contrary to this contention of the government for there the credit was allowed in 1926 and suit was not filed until 1929.

IF RESPONDENT'S VIEW AS TO 1917 BE ADOPTED THE SUIT MAY BE SUSTAINED AS ONE TO RECOVER A 1918 TAX OVERPAYMENT.

On page 14 of its brief the government states plaintiff's counsel "indicated in open court at the time of the trial that plaintiff relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917" and cannot now claim it states a case for 1918.

It is axiomatic that the case stated by the petitioner must be determined by the petition alone and not by oral statements of counsel in court not appearing of record.

It must be remembered that the government did not challenge the jurisdiction in the District Court but first did this in the Court of Appeals.

The case was tried in the District Court February 15, 1933 (R. 30). The Circuit Court of Appeals for that Circuit had held in *Routzahn* v. *Reeves Brothers Co.*, 59 F. (2d) 915, 917, decided June 29, 1932, that the credit was a payment of the 1917 taxes. Petitoner's counsel could not be expected to take a position in the District Court contrary to its Court of Appeals. However if the contention here made by the government that the Court of Appeals view the credit was a collection of the 1917 tax is wrong, finds favor with this court, then it is submitted petitioner is entitled to offset this by contending that the suit may be considered one for 1918 taxes and so considered the District Court had jurisdiction. The 1918 Collector was out of office when the suit was brought and unquestionably an action could have been brought against him. The contention of the government that a 1918 refund claim is a prerequisite to suit is admitted and answered at page 25 of our main brief.

Furthermore while a claim for refund must be filed before suit (it affirmatively appears one was filed here) it need not

be filed within five years of filing the return. *Western Wheeled Scraper Co.* v. *United States*, 72 F. (2d) 487 (C. C. A. 7th). For example the statute provides a refund shall be made without any claim and regardless of any limitation in case of a reduction of invested capital (Page 18 respondent's brief). In the case of an overpayment found by the Board of Tax Appeals no claim is required if the petition to the Board was filed before the time for filing a claim expired. However in such cases a claim may be required before suit—albeit it be filed more than five years after the return.

However this taxpayer's claim for 1918 had been allowed, not rejected, and it could not sue for 1918 until the claim was rejected. (R. S. 3226 was amended in 1932 to remedy this defect.) Accordingly it renewed its 1918 demand (R. 24) which resulted in its first rejection (R. 21) and within two years thereafter brought this suit.

The suit was a suit to recover an Internal Revenue tax and not a contract suit on an account stated. It did not state a cause of action on an account stated because it did not allege the delivery of a certificate of overassessment to it. *Daube* v. *United States*, 289 U. S. 367, 379. It did not do this because such a suit is a contract suit and not a tax suit and the District Court has no jurisdiction of contract suits against the United States in excess of $10,000.

Even if the Commissioner has allowed the overpayment it does have jurisdiction of a tax suit against a Collector to recover an amount allowed by the Commissioner. *Tucker* v. *Alexander*, 25 F. (2d) 425, 429 (C. C. A. 8th). Indeed the Collector has nothing to do with either the allowance or rejection of a refund and his liability should not depend on something with which he has nothing to do. This phase of the case is completely argued in our main brief.

RESPONDENT'S CASES DISTINGUISHED.

Of the cases cited on page 7 of respondent's brief *Untermyer* v. *Bowers*, 7 F. Supp. 347 was reversed in 79 F. (2d) 9 and the government's petition for certiorari was denied in 296 U. S. 641. *Moses* v. *United States*, 61 F. (2d) 791 and *Gans Steamship Line* v. *United States*, 65 F. (2d) 1016 were not suits to recover Internal Revenue taxes but were contract suits on an account stated. (See the government's response to the taxpayer's petition for certiorari in this Court, page 9 of its memorandum in the Moses case and page 4 in the Gans case.) Later the Gans Company brought another suit for an Internal Revenue tax of which the District Court clearly had jurisdiction and it is this later suit which is quoted from at page 26 of our main brief.

THE RULE OF SOVEREIGN IMMUNITY.

In the last analysis the government's case comes now to a request for a strict construction of the statute granting jurisdiction in favor of the rule of sovereign immunity. The best discussion of how this rule came to be adopted in this country is contained in *United States* v. *Lee*, 106 U. S. 196, at pages 205, 209, which the historian of this court declares is "now regarded as one of the glories of American law." *Warren*, 673, 674.

In many respects a State is more sovereign than the United States. Also the immunity of the United States does not rest on the Constitution or on a statute while the immunity of a State to suit by a citizen rests on the Constitution. Yet this court has held that if a State appears without objection it waives this immunity which is a personal privilege. *Missouri* v. *Fisk*, 290 U. S. 18, 24, while it has held that the immunity of the United States may only be waived by an act of Congress. It is hard to reconcile these holdings. If a State had been a defendant and had made the objection for the first time in the Circuit Court of Appeals

as the United States did here, it would have waived its immunity.

All of which is respectfully submitted.

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